Supreme Court, U.S.
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No. 02-1739 MAY 27 2003

OFFICE OF THE CLERK

In The
Supreme Court of the United States

WILLIE YOUNG, a.k.a. Punchie,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, AFTER AN APPEAL BY THE DEFENDANT (WITH NO CROSS-APPEAL BY THE GOVERNMENT), THE COURT OF APPEALS VACATES THE DEFENDANT'S SENTENCE FOR A NEW SENTENCING HEARING, MAY THE GOVERNMENT ADD EVIDENCE TO THE RECORD AND THEREBY HAVE A "SECOND BITE OF THE APPLE" WITHOUT VIOLATING THE DOUBLE JEOPARDY CLAUSE.

II. WHETHER DUE PROCESS OF LAW REQUIRES PROOF BY CLEAR AND CONVINCING EVIDENCE TO PROVE A SENTENCING ENHANCEMENT, WHICH IS SO ENORMOUS THAT IT AMOUNTS TO "A TAIL WHICH WAGS THE DOG OF THE SUBSTANTIVE OFFENSE."

INTERESTED PARTIES

There are no parties to the proceeding other than those named in caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Willie Young respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit rendered on December 26, 2002 in the 11th Cir. Case No. 01-14806.

OPINIONS BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which reversed and remanded Young's original sentence in the United States District Court for the Southern District of Florida, is contained in Appendix A (Young I). The second decision of the United States Court of Appeals for the Eleventh Circuit in this case, which affirmed the sentence it previously vacated in the United States District Court of Florida for the Southern District of Florida, is contained in Appendix B (Young II).

STATEMENT OF JURISDICTION

This Petition has been filed within 90 days of February 25, 203; the date the United States Court of Appeals for the Eleventh Circuit denied Young's Petition for Rehearing En Banc, a copy of which is contained in the Appendix C. See Sup. Ct. R. 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury;...nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb;... nor be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE FACTS

On February 5, 1999 a Grand Jury in Miami, Florida indicted Willie Young (Young) and others in the United States District Court for the Southern District of Florida. Regarding the two offenses charged against Young on March 25, 1999, Young was acquitted of conspiracy to possess with intent to distribute heroin and cocaine from July 31, 1986 to June 1998, but he was convicted of the substantive count of possession with intent to distribute an ounce of heroin on May 26, 1996.

Over defense objection, on June 3, 1999, the district court used Young's acquitted conspiratorial conduct as "relevant conduct" to sentence Young to 327 months of imprisonment followed by 6 years of supervised release. The defense argued that under a clear and convincing burden of proof that purported "relevant conduct" was unproven, consistent with the jury's verdict. No physical evidence at trial linked Young to his co-defendant's cocaine dealings, and undercover recorded conversations of that co-defendant (Thompson) revealed that his drug dealings were separate, unrelated, and independent from Young and unknown to him.

Young's offense of conviction under the federal sentencing guidelines provided for a sentence of incarceration of 4 ½ years, however, using his acquitted conduct, the district court sentenced Young to 27 ¼ years in prison. That sentence is nearly 7 times greater than the sentencing guideline penalty provided for by Young's offense at conviction. This case is clearly a case in which the "relevant conduct" amounts to a sentencing enhancement that is "a tail which wags the dog of the substantive offense."

Moreover, without making any individual finding from the record of drug quantity attribution to Young, the district court relied exclusively on the Presentence Investigation Report (PSI), over defense objection, to hold Young responsible for his codefendant's drug dealings. The jury had found Young not guilty of that conspirational conduct. The PSI recommended that Young be held accountable for more than 50 kilograms of cocaine purportedly

purchased by his co-defendant, Thompson, from the government's rogue informant, Patterson. Patterson, himself, had acknowledged that he had had no drug dealings with Young. On August 29, 2000, the Court of Appeals for the Eleventh Circuit affirmed Young's conviction for the sale of an ounce of heroin, but reversed the sentence and remanded for resentencing (A-4). On page 6 of the opinion, the Eleventh Circuit wrote:

> The presentence investigation report (PSI) stated that from July 4, 1994 to October 20, 1995, Thompson sold Patterson "multiple kilos" of cocaine twice a month. Young objected to the statement; the Government therefore had the burden of establishing the quantities of drugs Thompson sold Patterson. The problem we face in this appeal is that the Government offered no evidence--either at trial or at sentencing--to substantiate the PSI statement (A-5).

In Young I, the Eleventh Circuit vacated Young's sentence and remanded for the district court to make "appropriate factual finding" (A-4). This decision did not direct the district court to take further testimony, add transcripts to the record or otherwise supplement the existing record in Young's case. In other words, the appellate decision did not authorize the district court to give the government "a second bite at the apple."

Nonetheless, on May 2, 2001 after remand, the district court overruled the defense's timely objection by permitting the government to supplement Young's record with the transcript of DEA Special Agent Barrett's testimony on June 18, 1999 at the separate sentencing hearing of Young's co-defendant, Thompson. Neither Young nor his counsel attended the hearing on June 18, 1999. Then, on August 14, 2001, after adding the co-defendant's sentencing transcript, the district court again sentenced Young to serve 327 months incarceration followed by 6 years of supervised release. Having preserved the issue for appeal, Young argued that the government was not authorized by the mandate to add to Young's record, and, besides, there was no clear and convincing evidence to hold Young accountable for the conduct of his co-defendant for which he was acquitted. Without explanation and contrary to the facts, the Eleventh Circuit, in Young II, held that the government did not take "a second bite at the apple" and affirmed Young's sentence (B-2). The preponderance of the evidence standard for the government's burden of proof of "relevant conduct" despite its enormous impact on Young's sentence was unchanged in Young II (B).

REASONS FOR GRANTING THE WRIT

I. THE COURT HAS THE OPPORTUNITY TO RESOLVE TWO RECURRING FIFTH AMENDMENT ISSUES IN CONFLICT AMONG THE CIRCUITS, TO WIT: (1) WHETHER AFTER A REMAND FOR INSUFFICIENT EVIDENCE TO PROVE A SENTENCING ENHANCEMENT THE GOVERNMENT MAY ADD TO THE RECORD AND THEREBY "HAVE A SECOND BITE OF THE APPLE" WITHOUT VIOLATING DOUBLE JEOPARDY; AND (2) WHETHER DUE PROCESS REQUIRES PROOF BY CLEAR AND CONVINCING EVIDENCE TO PROVE A SENTENCING ENHANCEMENT WHICH IS SO ENORMOUS THAT IT AMOUNTS TO "A TAIL WHICH WAGS THE DOG OF THE SUBSTANTIVE OFFENSE."

It has been the mission of the federal judiciary over the past quarter century to bring predictability and uniformity to sentencing. The unfettered discretion and arbitrariness at sentencing of a generation ago has been evolving through federal sentencing reform into an orderly procedure designed to eliminate unwarranted sentencing disparity. The sentencing hearing is most often the most significant proceeding in criminal courts. The case at bar offers the High Court the opportunity to close two open wounds on the body of criminal justice which continue to spill pages of ink onto appellate decisions, and place criminal defendants in the untenable posture of having to rely upon their district's geography for determining how sentencing guideline enhancements will impact

on their lives. The open questions presented in this case are so common in appellate decisions that they are identified by hackney metaphors, to wit: (1) may the government after remand in this case, for insufficiency of proof and thereby take "a second bite of the apple," and (2) if the government can supplement the record after remand, then is the Government required to prove by clear and convincing evidence of a sentencing enhancement which amounts to "a tail which wags the dog of the substantive offense."

A. "A Second Bite of the Apple"

In Young I (A), the Eleventh Circuit affirmed Young's conviction for the sale of one ounce of heroin, but reversed and vacated his sentence of 327 months of incarceration. This enormous sentencing enhancement relied upon a theory of "relevant conduct" based on Young's co-defendant's (Thompson's) dealings with a rogue informant (Patterson). Young's jury had acquitted him of conspiring with his codefendants, including Thompson. The government relied on a PSI statement to support this sentencing enhancement. However, since Young's original record disclosed no evidence "at trial or at sentencing--to substantiate the PSI's statement," that enormous enhancement was vacated and the case was remanded (A-5). Specifically, the Eleventh Circuit remanded for "resentencing, at which time appropriate findings may be made" regarding Young's sentence (A-4).

At resentencing the government, over defense's timely objection was permitted to supplement Young's record with a transcript from Young's codefendant's (Thompson's) sentencing hearing. Neither Young nor

his counsel were present at the sentencing of Thompson. Thereupon, the district court again sentenced Young to serve 327 months of incarceration followed by 6 years community control based on the "relevant conduct" of his co-defendant (Thompson)--for which he had been acquitted.

In Young II (B), the Eleventh Circuit found that the district court complied with its mandate and rejected (without explanation) the defendant's argument that the government got a "second bite" at the apple. Of course, logically, no other explanation can be given to justify the resentencing of Young to his original sentence without consideration of the supplementation of the record with Young's codefendant's sentencing transcript. If the government had not been given "a second bite at the apple," then the record would have remained without evidence from either the trial or sentencing hearing "to substantiate the PSI's statement" that Young should be held accountable for his codefendant's conduct, for which he had been acquitted.

In Burks v. United States, 437 U.S. 1, 18 (1978), this Court held that the Double Jeopardy Clause prohibits the government from presenting additional evidence at trial after a conviction is reversed for insufficient evidence. It is time for this Court to extend this constitutional prohibition to the sentencing hearing. No cogent argument can be offered to avoid incorporation of this trial safeguard into the sentencing stage. It is the next logical step in sentencing reform.

At the present time, when considering sentencing hearings after remand for insufficiency the circuits run the spectrum from open de novo hearings to closed review from only the existing record. For example, in United States v. Fernandez-Angulo, 897 F.2d 1514, 1516-1517 (9th Cir. 1990) (en banc); and United States v. Gutierrez-Hernandez, 94 F.3d 582, 585 (9th Cir. 1996) the Ninth Circuit held it will remand for sentencing on an open record--without limitation on the evidence that the district court may consider. The Eighth Circuit has taken an opposite tact in United States v. Monroe, 978 F.2d 433, 435-36 (8th Cir. 1992); and United States v. Hudson, 129 F.3d 994, 995 (8th Cir. 1997) (per curiam) where remand for resentencing may only be made on the existing record.

Significantly the facts in Hudson are strikingly similar to those in the case at bar. In Hudson, the district erred by adopting the federal findings of the PSI; despite defense's timely objection--on remand the government was foreclosed from supplementing the existing record. Had Young been sentenced in the Eighth Circuit instead of the Eleventh Circuit, he would have faced a prison sentence of not more than 51 months, rather 327 months of prison he received in the Southern District of Florida. This disparity, predicated only on geography, is contrary to the indisputable goal of federal sentencing reform, which is the elimination of unwarranted sentencing disparity.

Other circuits, such as the Third Circuit, have taken a middle position on this issue. In United States v. Dickler, 64 F.3d 818, 831-32 (3rd Cir. 1995) the Third Circuit held, "where the government has the burden of production and persuasion, its case should ordinarily

have to stand or fall on the record it makes the first time around," but added that under certain particular matters, such as a victim's loss, the district may consider additional evidence at resentencing. Then there are circuits like the Eleventh Circuit, which sometimes employ a de novo rational, and other times employ a closed record rational after remand. As noted above, in the ruling of Young II the Eleventh Circuit avoided the issue, but did so without a logical explanation, since the government clearly was given "a second bite of the apple" despite the decision's denial of that event.

In Jackson v. Virginia, 443 U.S. 307, 316 (1979), this Court held, "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof." The Eleventh Circuit in United States v. Lawrence, 47 F.3d 1559, 1566 (11th Cir. 1995) held the government bears the burden of proving the amount of drugs to be attributed to the defendant when he challenges that amount. Obviously, if the government is afforded "a second bite at the apple" to meet its burden of proof, then a defendant's challenge for sufficiency of the evidence at his sentencing will be reduced to a fool's errand, and the government's burden of proof will dissolve into a legal fiction. Moreover, it would be an absurd result for a party, who had chosen not to appeal a point, to stand better with regard to the "law of the case," than the party that was granted appellate relief. United States v. Escobar-Urrego, 110 F.3d 1556, 1560 (11th Cir. 1997).

It has long been well-settled law under the "mandate rule" that a trial court acting under an appellate court's mandate cannot very it, or examine it

for any other purpose than execution; or give any other relief; or review it, even for apparent error, upon a matter decided. In re: Sanford Fork and Tool Co., 160 U.S. 247, 255 (1895). The "mandate rule" is an application of "the law of the case" doctrine. Piambo v. Bailey, 757 F.2d 1112,1120 (11th Cir. 1985). It is predicated on the ancient premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate on chances from changes in its members." Robert v. Cooper, 20 Howard 467, 61 U.S. 467 (1858).

It is a denial of the Double Jeopardy Clause and the Due Process Clause of the Fifth Amendment to the U.S. Constitution if the government is given "a second bite at the apple" after it failed to meet its burden of proof when obliged to do so at the first sentencing hearing. The time is ripe for this Court to bring uniformity and predictability to this sentencing issue.

B. "A Tail which Wags the Dog"

In Young I, the Eleventh Circuit stated, "conduct for which a defendant has been acquitted may be considered 'relevant conduct' for sentencing purposes if the defendant is shown by a preponderance of the evidence to have engaged therein" (A-4). In support of this principle that court cited United States v. Watts, 519 U.S. 148, 117 S. Ct. 633 (1997). However, this Court in Watts alerted Courts of Appeal that the preponderance standard may not be applicable in all cases, as follows:

> We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence... The cases before us today do not present such exceptional circumstances, and we therefore do not address that issue. 117 S.Ct. 637, 638.

That case is now before the Court and this persistent appellate issue is ripe for resolution. This question has been lingering in the federal courts for a long time. In McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986) the Court noted that the preponderance of the evidence standard was appropriate where there was no allegation that the sentencing enhancement was "a tail which wags the dog of the substantive offense." Likewise, in Justice White's dissent to the denial of the petition for writ of certiorari in Kinder v. United States, 504 U.S. 946, 948-49 (1992) this issue was raised as one which was ripe for resolution by the High Court.

Young's jury acquitted him of conspiracy to possess with intent to distribute both heroin and cocaine with several alleged codefendants, including Roger Thompson. Young's only offense of conviction involved the sale of slightly less than one ounce of heroin. The presentence investigation report (PSI) revealed a criminal history IV for Young. Thus, the U.S.S.G. § 2D1.1(11) with a criminal history IV, provided for a sentencing range of 41 months to 51 months incarceration for Young. The PSI claimed that Young should be held accountable as "relevant conduct" for the cocaine dealings of his codefendant,

Thompson, with a rogue informant, Henry Patterson. Young's original record did not substantiate this claim (A-6). Based on Thompson's sentencing hearing, which neither Young or his counsel attended; the DEA case agent testified that Thompson and Patterson engaged in the sale of 50 kilograms of cocaine.

Over defense objection, this transcript was added to Young's record after remand. U.S.S.G. § 2D1.1(2) at criminal history IV provides for a sentencing range in this case of 262 to 327 months incarceration. Young was sentenced and resentenced to the maximum penalty of 327 months incarceration, even though he was only convicted of selling less than an ounce of heroin, based on his acquitted conduct. The jury's verdict of not guilty was nullified. This is a generational enhancement in Young's sentence, increasing his offense base level from 18 to 36. Since this case involves "a tail which wags the dog of the substantive offense" it affords this Court the opportunity to resolve this long lingering unsettled sentencing issue dealing with the government's burden of proof under these circumstances and thereby, eliminate unwarranted disparity among the circuit at sentencing hearing.

Prior to the resentencing, after the remand, there was no evidence at trial or sentencing hearing to support the PSI's recommendation that Young be held accountable for his codefendant's 50-kilogram cocaine deals with the government informer. After the remand, the government supplemented the record with testimony from Young's co-defendant's separate sentencing hearing to establish the 50 kilograms of sales by codefendant Thompson. In

Young I, the Eleventh Circuit held that based on a preponderance of the evidence standard in accord with United States v. Averi, 922 F.2d 765, 766 (11th Cir. 1991). Young was held responsible for those cocaine deals involving his codefendant, co-defendant Thompson (A-4). Had the higher standard of proof (i.e. by clear and convincing evidence) been employed, that finding of attribution to Young could not have been made by the court.

Many Courts of Appeal have concluded that the Eleventh Circuit's ruling in Averi, supra is inappropriate where the sentencing enhancement is enormous, as it is in the instant case. See, e.g., United States v. Gigante, 94 F.3d 53 (2d Cir. 1996); United States v. Kikumuna, 918 F.2d 1084 (3d Cir. 1990); United States v. Megerson, 4 F.3d 337 (5th Cir. 1993); United States v. Corbin, 998 F.2d 1377 (7th Cir. 1993); United States v. Tomnley, 929 F.2d 365 (8th Cir. 1991); and United States v. Hopper, 177 F.3d 824 (9th Cir. 1999).

In Matthew v. Eldridge, 424 U.S. 319, 334-35 (1976) this Court held that the amount of due process increases under the Fifth Amendment with the degree of the liberty interest at stake in the preceeding. The type of due process a person receives should not depend upon where the defendant's chair is located in this country. Had Young been tried in a district where the clear and convincing evidence standard is employed to judge the proof of a sentencing enhancement with enormous impact, then he would have been sentence to serve only 51 months of incarceration, not the 327 months incarceration he received. Federal sentencing reform cannot continue to

tolerate this unwarranted sentencing disparity among the circuits. It is time for this Court to speak in a clear voice to resolve this unsettled and recurring sentencing issue.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that his Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED SATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11566
Non-Argument Calendar

D.C. Docket No. 97-00662-CR-2-KMM-1

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIE YOUNG, a.k.a. Punchie,
ROGER THOMPSON, a.k.a. Black Pete,
Defendants-Appellants.

[Entered August 29, 2000]

Appeals from the United States District Court
for the Southern District of Florida

Before TJOFLAT, BLACK and MARCUS, Circuit Judges.
PER CURIAM:

In a multi-count (redacted) indictment, Willie Young and Roger Thompson were charged, in Count One, with conspiring with one another and with Rickey Brownlee from July 31, 1986 to June 26, 1998 to possess with intent to distribute cocaine and heroin, in

violation of 21 U.S.C. § 846 (1994). In addition, Young was charged in Count Three with possession with intent to distribute heroin on May 24, 1996, and Thompson was charged in Counts Two and Four with possession with intent to distribute cocaine on April 3, 1996 and December 17, 1996, all in violation of 21 U.S.C. § 841(a)(1) (1994). Young and Thompson were tried together; a jury acquitted them of the conspiracy offense, but convicted them of the substantive offenses. Young now appeals his conviction and sentence; Thompson appeals his sentences.

Background

Notwithstanding appellants' acquittal on the conspiracy charge, the evidence before the jury (and therefore the district court at sentencing) established that Brownlee began drug trafficking in Opa Locka, Florida, on July 31, 1986. Beginning in 1984, Brownlee, who had a ready supply of heroin and cocaine and a sizeable distribution system, employed Young as a middleman for distribution and sale of his heroin; Young also served as an "enforcer" for the Brownlee organization. At the same time, Brownlee employed Thompson as a middleman to distribute kilogram quantities of cocaine to would be purchasers. Until they were arrested, appellants were present at or were directly involved in numerous drug transactions; persons seeking to purchase narcotics from the Brownlee organization would contact a distributor, such as Young and Thompson, negotiate a price, and agree to a time and place for the completion of the transaction. Many of these transactions took place with Government informers, who were supervised by DEA agents.

Young's Appeal

Young's brief presents two issues. The first relates to his conviction: "Whether... he was denied his constitutional rights of Due Process to present his defense and Compulsory Process to call favorable witnesses who were offered pursuant to Federal Rule of Evidence 404(b), by the district court's exclusion of witnesses who would have testified that the Government's informant, [Katrina Johnson,] had the special skills to conceal objects on her person and deceive Government agents about her conduct." The second issue concerns Young's sentence: "Whether the district court erred when [in fashioning his sentence it relied] upon acquitted conspiratorial conduct which is not supported by a preponderance of specific and reliable evidence to show that [he] jointly undertook criminal activity with his alleged co-conspirators."

Addressing the first issue, we note first that Young did not testify in his own defense (neither did Thompson). What he complains of is the court's exclusion of testimony Young proffered in an attempt to bolster his lawyer's closing argument to the jury that informant Johnson had not engaged in a heroin deal with Young. The testimony would have shown that Johnson was skilled at shoplifting and had given misleading statements to a law enforcement officer; hence, according to Young, the jury may have disbelieved her statements to a DEA agent (who was monitoring Johnson's activity) concerning her transaction with Young. We find no abuse of discretion in the court's refusal to allow the testimony, and therefore affirm Young's conviction.

Young attacks his sentence on the ground that the court erred in treating as relevant conduct under the Guidelines conduct for which he had been acquitted, and in finding him responsible for Thompson's course of drug dealings. We reject the argument that the court was precluded from using conduct for which Thompson had been acquitted in determining his relevant conduct. Conduct for which a defendant has been acquitted may be considered "relevant conduct" for sentencing purposes if the defendant is shown by a preponderance of the evidence to have engaged therein. United States v. Watts, 519 U.S. 148, 155-57, 117 S.Ct. 633, 637-38, 136 L. Ed. 2d 554 (1997); United States v. Averi, 922 F.2d 765, 766 (11th Cir. 1991). However, in holding Young responsible for Thompson's cocaine trafficking - in quantities that totaled over 50 kilograms - the court erred; it failed to make the appropriate factual finding concerning Thompson's activity. We therefore vacate Young's sentence and remand the case for further resentencing, at which time appropriate findings may be made - regarding the quantity of drugs Thompson trafficked and for which Young should be held accountable - and Young can be afforded an opportunity to object thereto. We explain below why the vacation of Young's sentence is necessary.

When a defendant has participated in jointly undertaken criminal activity, relevant conduct includes "all reasonably foreseeable acts and omissions of others in furtherance" of such activity. See U.S. Sentencing Guidelines Manual § 1B1.3(a)(1)(B) (1998). In deciding whether to include the acts or omissions of others, the court must first make an individualized finding as to

the scope of the criminal activity the defendant undertook. See United States v. Beasley, 2 F.3d 1551, 1561 (11th Cir. 1993). In a drug trafficking case, the court then must determine the quantity of drugs reasonably foreseeable at the defendant's level of participation. Id. If the court makes no findings regarding such quantity, we may nonetheless uphold the sentence if the record supports the amount of drugs the court attributed to the defendant. Id.

In this case, the court did not err in holding Young responsible for Thompson's course of dealings with informant Patterson. As noted above, in addition to distributing heroin for Brownlee, Young served as his enforcer. In that capacity, and as the district court found, he knew about Thompson's activities, which included (according to Thompson in a recorded conversation) the distribution of multiple kilograms of cocaine to Patterson each month. See U.S.S.G. § 1B1.3, comment. (n.2(c)(4)) (showing example where court should hold defendant, who is the assistant of a wholesale distributor and frequently supervises deliveries to customers, responsible for the entire quantity distributed by the distributor.)

The presentence investigation report (PSI) stated that from July 4, 1994, to October 20, 1995, Thompson sold Patterson "multiple kilos" of cocaine twice a month. Young objected to the statement; the Government therefore had the burden of establishing the quantities of drugs Thompson sold Patterson. The problem we face in this appeal is that the Government offered no evidence - either at trial or at sentencing - to substantiate the PSI's statement. "Multiple kilos" is,

obviously, an unspecified amount. (At Thompson's sentencing hearing, the Government presented testimony of DEA Agent Robert Barrett that Thompson sold Patterson about "two" kilograms of cocaine twice a month; however, Barrett's testimony was not before the court at Young's sentencing hearing.) In sum, the court erred in relying on the PSI's multiple kilograms statement when it arrived at the drug quantities (trafficked by Thompson) for which Young should be held accountable.

Thompson's appeal

Like Young, Thompson contends that, in determining his relevant conduct, the district court erred in including activity for which he had been acquitted. As we hold in disposing of Young's appeal, there was no error. Thompson contends alternatively that if the Guidelines permitted the court to consider conduct for which he was acquitted, the court erred when it relied on hearsay testimony in making its drug-quantity calculation and holding him accountable for at least 50 kilograms of cocaine. The court should not have relied on the testimony because, he argues, it was unreliable.

The testimony at issue came from DEA Agent Barrett. He testified that in a tape recorded conversation with informant Johnson, Thompson stated that Patterson would come twice a month for two kilograms of cocaine; on one occasion, Patterson received ten kilograms. This tape recording corroborated what the informants, Patterson and Johnson, told the DEA agents during the course of the

agency's investigation of the Brownlee drug trafficking organization. Although the court did not make specific findings concerning the reliability of Barrett's testimony, the record contains ample indicia of reliability. In short, we find no error in the court's attribution of in excess of 50 kilograms of cocaine to Thompson, and therefore affirm his sentence.

AFFIRMED, in part, VACATED and REMANDED, in part.

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED SATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14806

D.C. Docket NO. 97-00662-CR-2-KMM

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIE YOUNG, a.k.a. Punchie,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Florida

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(December 26, 2002)
[Entered December 26, 2002]

Before EDMONDSON, Chief Judge, DUBINA, Circuit Judge, and HODGES*, District Judge.

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* Honorable Wm. Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

Appellant Willie Young appeals his sentence imposed by the United States District Court for the Southern District of Florida for distribution of heroin, in violation of 21 U.S.C. § 841(a)(1).[1]

After reviewing the record, reading the parties briefs, and having the benefit of oral argument, we affirm Young's sentence because the district court, on remand, clearly complied with our earlier mandate and the record does not support Young's argument that the government got a "second bite" at the apple.

AFFIRMED.

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[1] This is the second time that we have had an opportunity to consider this case. Young previously appealed his conviction and sentence. In that appeal, we affirmed Young's conviction, vacated his sentence, and remanded the case for resentencing. *United States v. Young*, 99-11566 (August 29, 2000).

APPENDIX C

[DO NOT PUBLISH]

IN THE UNITED SATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14806 BB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIE YOUNG, a.k.a. Punchie,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Florida

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[Entered February 25, 2003]

ON PETITION FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir. 19__, ___ F.2d ____).

Before: EDMONDSON, Chief Judge, DUBINA, Circuit Judge, and HODGES*, District Judge.

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* Honorable Wm. Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
Joel F. Dubina
United States Circuit Judge

Supreme Court, U.S.
FILED
AUG 29 2003
OFFICE OF THE CLERK

No. 02-1739

In the Supreme Court of the United States

WILLIE YOUNG, AKA PUNCHIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause prohibits a district court from receiving additional evidence of the specific quantity of drugs attributable to a defendant, when the court of appeals has remanded for resentencing based on its finding that the district court had erred in relying on the presentence report's assessment of drug quantity.

2. Whether the Due Process Clause requires the government to establish drug quantity at sentencing by clear and convincing evidence, when the drug quantity attributable to the defendant could greatly increase his sentence under the Sentencing Guidelines.

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In the Supreme Court of the United States

No. 02-1739

WILLIE YOUNG, AKA PUNCHIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction, but vacating his sentence and remanding (Pet. App. A1-A7) is unreported, but the judgment is noted at 233 F.3d 578 (Table). The opinion of the court of appeals affirming petitioner's sentence after remand (Pet. App. B1-B2) is unreported, but the judgment is noted at 55 Fed. Appx. 900 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 26, 2002. A petition for rehearing was denied on February 25, 2003. Pet. App. C1-C2. The petition for a writ of certiorari was filed on May 27, 2003 (following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 327 months of imprisonment, to be followed by six years of supervised release. The court of appeals affirmed the conviction but vacated the sentence and remanded for resentencing. Pet. App. A1-A7. On remand, the district court reimposed the same sentence. The court of appeals affirmed. Pet. App. B1-B2.

1. Beginning in July 1986 and lasting until June 1998, petitioner and his co-defendant, Roger Thompson, distributed drugs for the Rickey Brownlee organization, based in Opa Locka, Florida, a suburb of Miami. Petitioner also served as an enforcer for the organization. Pet. App. A2.

Both Thompson and petitioner sold drugs to Katrina Johnson, a government confidential informant who previously had purchased drugs from the Brownlee organization and who was a former girlfriend of Henry Patterson, a major Brownlee customer who also became a government informant. Gov't C.A. Br. 3.[1] During one surreptitiously tape-recorded conversation, Thompson told Johnson that he had sold Patterson ten kilograms of cocaine on one occasion and regularly sold him two kilograms of the drug about twice a month. Gov't C.A. Br. 29. (Patterson later told federal investigators

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[1] Following the citation convention used in the petition, this brief refers to petitioner's first appeal (C.A. No. 99-11566-BB) as *Young I*, and refers to his second appeal (C.A. No. 01-14806-BB) as *Young II*. Unless otherwise noted, citations to the government's court of appeals brief refer to the brief filed in the first appeal.

that these regular sales continued for a 15-month period between July 1994 and October 1995. See 5/2/01 Sent. Tr. 21, 66; *United States* v. *Thompson*, No. 97-662-CR-KMM, 6/18/99 Sent. Tr. 22-23.) The day of that conversation, Thompson sold Johnson one kilogram of cocaine, and the following month Thompson agreed to provide her with 15 kilograms of cocaine and a half-kilogram of heroin. Gov't C.A. Br. 3-4.

In May 1996, Johnson approached petitioner at a restaurant owned by Brownlee and discussed purchasing a quantity of heroin. After conferring with Brownlee, petitioner agreed to sell Johnson one ounce of heroin two days later for $6000. On the day of the transaction, Drug Enforcement Administration (DEA) agents videotaped petitioner standing outside Brownlee's restaurant with a package in his hand. Thompson arrived in a vehicle and appeared to exchange a package with petitioner before departing. Gov't C.A. Br. 4-5. Three minutes later, Johnson arrived and handed $6000 to petitioner, who departed in a car owned by Brownlee. When petitioner returned, he gave Johnson a package containing one ounce of heroin. *Id.* at 5-6. In August 1996, Johnson again met with petitioner at Brownlee's restaurant and agreed to purchase two more ounces of heroin from petitioner for $10,000. Petitioner took Johnson's purchase money, but never provided the heroin, claiming later that it had been seized by law enforcement. In December 1996, Johnson visited Thompson at his car wash and discussed with him in a recorded conversation her dealings with petitioner and her desire to purchase additional drugs. Thompson assured Johnson that he had scolded petitioner for his mistreatment of Johnson. *Id.* at 6-7. When Johnson was on her way to meet Thompson,

petitioner approached her outside the car wash and attempted to sell her drugs. *Id.* at 31.

On December 17, 1996, Thompson mistakenly gave Johnson two kilograms of cocaine when she had paid for only one. Approximately one year later, after they had determined what had happened, petitioner and Brownlee approached Johnson and demanded that she return the extra kilogram. Because Johnson feared for her safety, a DEA agent assumed her undercover role in the investigation. The agent engaged Thompson in a recorded conversation in which Thompson explained that Brownlee was the source of the cocaine and that petitioner was one of Brownlee's henchmen. Gov't C.A. Br. 8; see also 3/22/99 Trial Tr. 495, 497-498 (Thompson states petitioner accompanied Brownlee "to scare [Johnson]").

2. Petitioner was charged in two counts of an 11-count indictment with conspiring with Brownlee, Thompson, and others to distribute heroin and cocaine, in violation of 21 U.S.C. 846, and with possessing heroin (together with Brownlee) with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court severed the trial of petitioner and Thompson from that of Brownlee and the others. The jury found petitioner guilty on the substantive heroin count and found Thompson guilty on two counts of possessing cocaine with intent to distribute it, but acquitted both of the conspiracy charge. Gov't C.A. Br. 11.

3. The Presentence Report (PSR) concluded that petitioner, as a "middleman" and "enforcer" who "served at the behest of" Brownlee, PSR ¶¶ 30-33, was responsible for the total quantity of narcotics that Brownlee's organization distributed, which the PSR estimated to be more than 50 kilograms of cocaine in addition to the heroin petitioner had sold. *Id.* ¶ 43.

Thompson's cocaine sales to Patterson accounted for the bulk of the drug quantity that the PSR attributed to the Brownlee organization. See PSR ¶¶ 11, 43. The total drug quantity yielded a base offense level of 36. PSR ¶ 43. Petitioner objected to being held responsible for anything more than the heroin he personally sold to Johnson. See Second Addendum to the Presentence Report at 1. Petitioner argued that he and Thompson were competitors who operated independently and that the government had not established that he was a co-conspirator of Thompson's such that he could be held responsible for Thompson's cocaine dealing. 6/3/99 Sent. Tr. 3-15. In response, the government argued that the PSR's calculation, which was based on the trial evidence, was reliable. The government also noted that it had evidence to establish numerous other transactions that had not been included in that calculation, including evidence that petitioner was present at the meeting at Thompson's house in July 1994 when Thompson arranged to provide Patterson with cocaine on a regular basis. *Id.* at 21. The government further stated that it would "rely upon the PS[R] which is based principally on the trial record" to establish that petitioner was responsible for at least 50 kilograms of cocaine, but that if the court had questions, the government was prepared "to present an agent [to testify] to fill in the gaps." *Id.* at 21-22.

The district court concluded that there was "overwhelming evidence" that a conspiracy existed and that petitioner, Thompson and Brownlee were participants. 6/3/99 Sent. Tr. 25. The court further found that

> [petitioner] and Thompson acted in various roles on behalf of Brownlee, either as sellers [or] distributors. In some sense, they may have even com-

> peted for some of the same customers. But they were, nevertheless, part of that same conspiracy with Brownlee at the hub—or they acted in other roles as well, [petitioner] in the role of an enforcer at times.

Id. at 25-26. The court also concluded it was "certainly foreseeable," given "the scope, * * * the length of the conspiracy, [and] the frequency of the activity within the conspiracy," that the conspiracy would distribute more than 50 kilograms of cocaine. *Id.* at 26. Accordingly, the district court adopted the PSR's sentencing calculation, which prescribed a total offense level of 36, a criminal history of IV, and a sentencing range of 262-327 months of imprisonment. After reviewing petitioner's extensive criminal history, *id.* at 41-55, the district court sentenced petitioner to the high end of the guidelines range, imposing a sentence of 327 months of imprisonment.[2]

4. The court of appeals affirmed petitioner's conviction, but vacated his sentence. Pet. App. A1-A7. The court rejected petitioner's claim that the sentencing court was foreclosed from considering Thompson's sales because petitioner had been acquitted of conspiring with Thompson to distribute drugs. It explained that "[c]onduct for which a defendant has been acquitted may be considered 'relevant conduct' for sentencing purposes if the defendant is shown by a preponderance of the evidence to have engaged therein." *Id.* at A4 (citing *United States* v. *Watts*, 519 U.S. 148, 155-157

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[2] Petitioner's heroin distribution conviction carried an enhanced maximum term of imprisonment of 30 years under 21 U.S.C. 841(b)(1)(C), because the government gave notice pursuant to 21 U.S.C. 851 that petitioner had previously been convicted of a felony drug offense. See R. 277.

(1997) (per curiam), and *United States* v. *Averi*, 922 F.2d 765, 766 (11th Cir. 1991)). The court concluded that the district court "did not err in holding [petitioner] responsible for Thompson's course of dealings with [the] informant Patterson," noting that "in addition to distributing heroin for Brownlee, [petitioner] served as his enforcer. In that capacity, and as the district court found, he knew about Thompson's activities, which included (according to Thompson in a recorded conversation) the distribution of multiple kilograms of cocaine to Patterson each month." Pet. App. A5.

The court of appeals nevertheless vacated petitioner's sentence, holding that the court had "failed to make the appropriate factual finding concerning Thompson's activity." Pet. App. A4. Although the PSR stated that Thompson sold Patterson "'multiple kilos' of cocaine twice a month," petitioner objected to that statement, and the government had offered no evidence "either at trial or at sentencing" to specify how much was sold per month. *Id.* at A5. The court acknowledged that the government had presented the testimony of DEA Agent Robert Barrett at Thompson's sentencing hearing that "Thompson sold Patterson about 'two' kilograms of cocaine twice a month," but noted that "Barrett's testimony was not before the court at [petitioner's] sentencing hearing" (*id.* at A6), which had taken place two weeks earlier. The court accordingly vacated petitioner's sentence and remanded for resentencing, "at which time appropriate findings may be made—regarding the quantity of drugs Thompson trafficked and for which [petitioner] should be held accountable—and [petitioner] can be afforded an opportunity to object thereto." *Id.* at A4.

5. On remand, the district court rejected petitioner's argument that the court of appeals' remand order did not permit the taking of additional evidence, but only permitted additional fact finding on the existing record. 5/2/01 Sent. Tr. 8-10. The district court noted that there was "ample, ample evidence in the record at the trial" to support the conclusion that petitioner was responsible for the distribution of 50 kilograms of cocaine (*id.* at 10), but permitted the government to introduce the transcript of Agent Barrett's testimony at Thompson's sentencing hearing, to which the court of appeals had referred in its opinion. Petitioner then examined Barrett extensively about his prior testimony. Agent Barrett reiterated his testimony that Thompson sold Patterson approximately four kilograms of cocaine per month. *Id.* at 31-33. Barrett estimated that Thompson sold Patterson a total of 70 kilograms of cocaine. *Id.* at 66, 85. Agent Barrett also testified that Patterson once accompanied petitioner when petitioner distributed heroin and collected $17,000 in return (*id.* at 72), and that petitioner offered on behalf of the Brownlee organization to supply Patterson with 75 kilograms of cocaine. *Ibid.* Petitioner declined to call witnesses of his own, although the court continued the hearing once to permit him an opportunity to do so. Petitioner also declined to examine Patterson, whom the government had made available for the hearing. See *id.* at 89; 8/14/01 Sent. Tr. 2. The district court commented that "it's inescapable" that petitioner was "accountable for more than 50 kilograms" of cocaine (5/2/01 Sent. Tr. 11), and reimposed the original sentence. 8/14/01 Sent. Tr. 12-13.

6. The court of appeals affirmed. Pet. App. B1-B2. The court summarily rejected petitioner's claims that due process required proof by clear and convincing

evidence to justify sentence enhancements that greatly increase a defendant's sentence (Pet. C.A. Br. 27-35 (*Young II*)), that the government had not met its burden of proof in establishing the drug quantity attributed to him (*id.* at 42-50), and that petitioner should not be held responsible for Thompson's cocaine sales because they were not within the scope of jointly undertaken activity (*id.* at 35-42). The court of appeals also rejected petitioner's claim that the government should not have been permitted to supplement the record on the specific quantity of cocaine attributable to petitioner.[3] The court affirmed, stating that "the district court, on remand, clearly complied with our earlier mandate and the record does not support [petitioner's] argument that the government got a 'second bite' at the apple." Pet. App. B2.

ARGUMENT

1. For the first time in any court, petitioner argues (Pet. 7-11) that his resentencing violated the Double Jeopardy Clause and denied him due process of law because the government was permitted "a second bite at the apple" (Pet. 8, 11; see also Pet. 7, 10) when the district court allowed the government to introduce additional evidence at sentencing on remand. That contention does not merit further review.[4]

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[3] Petitioner initially did not challenge the district court's decision on remand to receive additional evidence. After briefing on the issues raised by petitioner was complete, the court of appeals ordered supplemental letter briefs on that issue. See Letter from Thomas K. Kahn, Clerk, United States Court of Appeals for the Eleventh Circuit, to counsel and parties, *United States* v. *Willie Young*, No. 01-14806-BB, at 1 (Sept. 11, 2002).

[4] In briefing before the court of appeals, petitioner invoked neither the Double Jeopardy Clause nor the Due Process Clause in

a. This Court has never applied the Double Jeopardy Clause to noncapital sentencing proceedings. See *United States* v. *DiFrancesco*, 449 U.S. 117, 132 (1980) ("neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support" application of Double Jeopardy Clause to noncapital sentencing). Relying on *Burks* v. *United States*, 437 U.S. 1 (1978), where this Court held that the Double Jeopardy Clause prohibits the retrial of a criminal defendant after his conviction is reversed on appeal for insufficient evidence, petitioner asks this Court to extend double jeopardy principles to sentencing proceedings. Pet. 8. This Court, however, has already concluded that *Burks* is "inapt" when a "failure of proof occurs in a sentencing proceeding," *Monge* v. *California*, 524 U.S. 721, 729 (1998), because "[t]he pronouncement of sentence simply does not 'have the qualities of constitutional finality that attend an acquittal.'" *Ibid.* (quoting *DiFrancesco*, 449 U.S. at 134). In *Monge*, the defendant argued that the Double Jeopardy Clause barred the State from having a second opportunity to prove his prior conviction for purposes of applying a provision of California's Three Strikes Law that resulted in the doubling of his term of imprisonment. The *Monge*

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contending that the district court had erred in receiving additional evidence. Petitioner instead argued that taking additional evidence violated the scope of the court of appeals' mandate and was contrary to the law of the case. See Pet. Supp. C.A. Br. 2-5 (*Young II*). Review of his current constitutional claim should be declined for that reason alone. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

Court held that the Double Jeopardy Clause does not "extend[] to noncapital sentencing proceedings." *Id.* at 724. Petitioner offers no reason to revisit that settled rule.[5]

Petitioner also invokes the Due Process Clause in passing (Pet. 11), but does not explain why it would offer protection that the most pertinent constitutional provision does not. This Court has expressly rejected the notion that "the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause." *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 116 (2003).[6] See generally *Medina* v. *California*, 505 U.S. 437, 443 (1992).

b. Petitioner contends (Pet. 9) that the courts of appeals are in conflict on whether the government may present additional evidence on remand after a finding of insufficient evidence to support a sentencing enhancement. He asks the Court to grant certiorari and to establish a rule that district courts may not permit the introduction of additional evidence on remand.

Under 28 U.S.C. 2106, a court of appeals may "affirm, modify, vacate, set aside or reverse any judgment, decree, or order" of the court whose decision it is re-

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[5] The drug quantity findings in this case did not extend petitioner's statutory maximum prison term, but merely resulted in an increase in his sentence under the Sentencing Guidelines *within* the statutory maximum term. See p. 6 & n.2, *supra*. Thus, this case raises no issue about the application of the Double Jeopardy Clause to a failure of proof on a fact that does raise the maximum sentence. Cf. *Monge*, 524 U.S. at 741 (Scalia, J., dissenting).

[6] Moreover, because petitioner did not mention the Due Process Clause in his question presented, see Pet. i, it appears he has not adequately presented the issue for review. See Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

viewing, and may "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." In addition, the statute governing sentencing appeals, 18 U.S.C. 3742, provides that, when a court of appeals finds a sentencing error, it must "remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. 3742(f)(1), (2)(A), and (2)(B). It is thus well settled that, after a court of appeals has reversed the judgment in a criminal case, it has authority to provide for de novo resentencing or for a limited resentencing. See, *e.g.*, *United States* v. *Moore*, 131 F.3d 595, 597-598 (6th Cir. 1997); *United States* v. *Santonelli*, 128 F.3d 1233, 1238 (8th Cir. 1997); *United States* v. *Webb*, 98 F.3d 585, 587 (10th Cir. 1996), cert. denied, 519 U.S. 1156 (1997); *United States* v. *Polland*, 56 F.3d 776, 777 (7th Cir. 1995); *United States* v. *Pimentel*, 34 F.3d 799, 800 (9th Cir. 1994), cert. denied, 513 U.S. 1102 (1995). It is also well settled that, except perhaps in extraordinary circumstances, a district court conducting a resentencing must act in conformity with the mandate of the court of appeals. See, *e.g.*, *Moore*, 131 F.3d at 598; *Webb*, 98 F.3d at 587; *United States* v. *Tamayo*, 80 F.3d 1514, 1519-1520 (11th Cir. 1996); *Polland*, 56 F.3d at 777-779; *Pimentel*, 34 F.3d at 800; *United States* v. *Bell*, 5 F.3d 64, 66 (4th Cir. 1993). The courts of appeals are thus in agreement that they have discretion to determine the scope of a resentencing, and that the district court is obligated to follow the directions of the court of appeals when conducting the resentencing.

The courts of appeals have taken various approaches to the question whether, when the mandate is silent about the scope of remand, the district court is limited

in resentencing to the evidentiary record of the initial sentencing or can receive additional evidence on remand. Most courts of appeals that have considered the issue presumptively permit the receipt of additional evidence on remand, at least for those issues that are the subject of the remand order. See *United States* v. *Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992) ("Once a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear any relevant evidence on that issue that it could have heard at the first hearing," subject to "any limitations imposed on its function at resentencing by the appellate court"); *United States* v. *Ortiz*, 25 F.3d 934, 935 (10th Cir. 1994) (following *Cornelius*); *Bell*, 5 F.3d at 66-67 (following *Cornelius*); see also *United States* v. *Matthews*, 278 F.3d 880, 885-886 (9th Cir.) (en banc) ("as a general matter, if a district court errs in sentencing, we will remand for resentencing * * * without limitation on the evidence that the district court may consider" in order to "allow[] for the fullest development of the evidence relevant to a just sentence"), cert. denied, 535 U.S. 1120 (2002).[7] The Third Circuit has adopted a rule presumptively limiting the record on remand to the evidence introduced during the initial sentencing, but the court also defers to the district court's decision to receive additional evidence. *United States* v. *Dickler*,

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[7] Although petitioner is correct that the Ninth Circuit presumptively remands "without limitation on the evidence that the district court may consider," see *Matthews*, 278 F.3d at 885, neither of the Ninth Circuit cases cited by petitioner (see Pet. 9 (citing *United States* v. *Fernandez-Angulo*, 897 F.2d 1514, 1516-1517 (1990) (en banc), and *United States* v. *Gutierrez-Hernandez*, 94 F.3d 582, 585 (1996), cert. denied, 519 U.S. 1084 (1997)) discusses the matter.

64 F.3d 818, 832 (1995) ("where the government has the burden of production and persuasion [for sentencing enhancements,] * * * its case should ordinarily have to stand or fall on the record it makes the first time around," but acknowledging that the district court is in a "far better position" to determine whether circumstances warrant receipt of additional evidence). The D.C. Circuit presumptively limits the receipt of new evidence on remand to that concerning such "new facts as are made newly relevant by the court of appeals' decision" in the case. *United States* v. *Whren*, 111 F.3d 956, 960 (1997), cert. denied, 522 U.S. 1119 (1998).[8]

No court, to our knowledge, has adopted the rule petitioner advocates, which would categorically prohibit receipt of additional evidence on remand when the court of appeals vacates the sentence because of insufficient evidence to support the district court's fact-finding. This Court's review to establish such a rule is not warranted. First, a blanket rule prohibiting receipt of additional evidence would be unsound. Even those courts that presumptively limit the remand to the

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[8] The authorities cited by petitioner (Pet. 9) do not assist him. Although in both *United States* v. *Hudson*, 129 F.3d 994, 995 (1997) (per curiam), and *United States* v. *Monroe*, 978 F.2d 433, 435-436 (1992), the Eighth Circuit remanded for resentencing on the existing record, the court did not purport to establish a general presumption that additional evidence could not be received on remand. Indeed, that court adopted the *opposite* presumption in *Cornelius*, 968 F.2d at 705. There is no question that the court of appeals' remand in this case did not place limits on the district court's ability to receive additional evidence on remand. See Pet. App. A4, B2 (the district court on remand "clearly complied with our earlier mandate"). Thus, petitioner errs in suggesting (Pet. 10-11) that the district court may have violated the "mandate rule," by permitting the government to supplement the record with Agent Barrett's testimony.

initial sentencing record appear to recognize that district courts may receive additional evidence if they determine that circumstances warrant doing so. See, *e.g.*, *United States* v. *Leonzo*, 50 F.3d 1086, 1088 (D.C. Cir. 1995) (suggesting that receipt of additional evidence is appropriate where "special circumstances justif[y]" government's failure to sustain burden of proof); *Dickler*, 64 F.3d at 832 ("we perceive no constitutional or statutory impediment" to permitting the introduction of additional evidence on remand if the government "has tendered a persuasive reason why fairness so requires").

The district court's decision to receive additional evidence was clearly justified by the circumstances of this case and illustrates why a per se rule forbidding the practice would be contrary to the interests of justice. The court of appeals expressed little doubt in its initial opinion that the evidence was sufficient to demonstrate that petitioner was responsible as Thompson's co-conspirator for the sale of numerous kilograms of cocaine. See Pet. App. A2 (noting that "the evidence before the jury (and therefore the district court at sentencing) established that * * * Brownlee employed Thompson as a middleman to distribute kilogram quantities of cocaine" and they "were present at or were directly involved in numerous drug transactions"). In its first opinion, the court of appeals seemed concerned principally with ensuring that the district court had received evidence supporting its specific quantity determination. See *id.* at A5-A6 (emphasizing that "'[m]ultiple kilos' is, obviously, an unspecified amount"). Moreover, the government indicated at petitioner's original sentencing hearing that it was prepared to present the testimony of Agent Barrett (who, two weeks later, testified at Thompson's sentencing on quantity) to establish the

drug quantity the PSR attributed to petitioner or to "fill in [any] gaps" the court saw in the record. 6/3/99 Sent. Tr. 21-22. The district court deemed the evidence adduced at trial sufficient to support the PSR's quantity calculation, however, and declined to hear additional testimony. *Id.* at 26. Thus, the lack of specific support in the record stemmed not from the government's failure to offer proof, but from the district court's decision not to receive the proffered evidence.

Second, it is unclear whether the district court in this case actually relied on the receipt of "new" evidence on remand. As the government noted during the second appeal, Gov't Supp. C.A. Br. 2-3 (*Young II*), the government introduced at trial a tape recording in which Thompson admitted that he had sold Patterson ten kilograms of cocaine on one occasion and that he regularly sold Patterson two kilograms twice a month. See Gov't C.A. Br. 29 (quoting R8:34-37; Gov't Tr. Exh. 10B). Given the frequency with which Thompson sold Patterson drugs, as the district court noted, "there was ample evidence from which to find that [petitioner] was involved in a conspiracy to distribute in excess of 50 kilograms, *and that's just on the trial record.*" 5/2/01 Sent. Tr. 9 (emphasis added).

Finally, it is unclear whether any minor differences in the approaches taken in the courts of appeals on whether receipt of additional evidence is presumptively permitted on remand when the remand order is silent requires this Court's intervention. All courts agree that the remand order can specify whether additional evidence may be taken, and no circuit appears to categorically prohibit the taking of new evidence. In the absence of any pressing need for a uniform national rule on this narrow issue, further review is unwarranted at this time.

2. Petitioner next contends (Pet. 11-15) that the petition should be granted to resolve a disagreement among the lower courts about whether the Due Process Clause requires a sentencing court to employ a heightened standard of proof when its determination of sentencing enhancements may substantially increase a defendant's punishment under the Sentencing Guidelines. This Court has noted that there is "a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase [a defendant's] sentence must be based on clear and convincing evidence." *United States* v. *Watts*, 519 U.S. 148, 156 & n.2 (1997) (per curiam); see also *Almendarez-Torres* v. *United States*, 523 U.S. 224, 248 (1998) ("we express no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence"). Several years ago, the United States filed a petition for a writ of certiorari seeking resolution of that issue. *United States* v. *Reed*, No. 99-1096 (filed Dec. 29, 1999) (seeking review of *United States* v. *Hopper*, 177 F.3d 824 (9th Cir. 1999), cert. denied, 528 U.S. 1163 (2000)).[9] In *Reed*, the court of appeals

[9] The government explained in the petition in *Reed* that there is a conflict between the Ninth Circuit's approach and decisions of the First, Fourth, and Tenth Circuits. See 99-1096 Pet. 14-16 (citing *United States* v. *Lombard*, 102 F.3d 1, 5 (1st Cir. 1996), cert. denied, 520 U.S. 1266 (1997); *United States* v. *Washington*, 11 F.3d 1510, 1516 (10th Cir. 1993), cert. denied, 511 U.S. 1020 (1994); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1239 (4th Cir.), cert. denied, 493 U.S. 943 (1989)). The Sixth Circuit has since joined the majority, concluding that "[a]s long as a sentencing factor does not alter the statutory range of penalties faced by the defendant for the crime of which he was convicted, *McMillan* [v. *Pennsylvania*, 477 U.S. 79, 88 (1986),] permits the factor to be found by preponderance of the evidence." *United States* v. *Gra-*

remanded the case to the district court for resentencing, based on the court of appeals' holding that certain sentencing factors had to be proved by clear and convincing evidence because of their effect on the petitioner's sentence. When the district court reimposed the same sentence on remand after finding the sentencing factors under the heightened standard required by the court of appeals, this Court dismissed the petition for certiorari on the government's motion. *United States* v. *Reed*, 529 U.S. 1063 (2000).

Although this case appears to present the question identified in *Reed*, further review of that question is

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ham, 275 F.3d 490, 518 n.19 (2001), cert. denied, 535 U.S. 1026 (2002). We are aware of no appellate decision outside the Ninth Circuit that has required proof of a sentencing factor (as opposed to a ground for a substantial departure) by more than a preponderance of the evidence.

The other cases cited by petitioner (Pet. 14) do not assist him. *United States* v. *Kikumura*, 918 F.2d 1084 (3d Cir. 1990), involved a departure from the Sentencing Guidelines rather than the application of a sentencing factor under the Guidelines, and its reasoning ultimately rests on an interpretation of the statute authorizing departures from the Guidelines, not a direct application of the Due Process Clause. See *id.* at 1102; *Watts*, 519 U.S. at 156 n.2 (noting that *Kikumura* did "not reach[] the due process issue"). The Third Circuit has since held that the preponderance standard applies to determinations of drug quantity and confined *Kikumura* to the departure context. See *United States* v. *Paulino*, 996 F.2d 1541, 1545 n.4, certs. denied, 510 U.S. 968 and 1018 (1993). The other cases petitioner cites either note the issue but decline to reach it, *United States* v. *Gigante*, 94 F.3d 53, 56 (2d Cir. 1996), cert. denied, 522 U.S. 868 (1997); *United States* v. *Townley*, 929 F.2d 365, 370 (8th Cir. 1991), or simply state that no such argument could be made on the facts of that case. See *United States* v. *Mergerson*, 4 F.3d 337, 344 (5th Cir. 1993), cert. denied, 510 U.S. 1198 (1994); *United States* v. *Corbin*, 998 F.2d 1377, 1387 (7th Cir. 1993), cert. denied, 510 U.S. 1139 (1994).

unwarranted in this case. Petitioner did not explicitly raise this argument in his initial appeal. Rather, he merely noted that this Court "[s]idestepp[ed] th[e] issue in *Watts*" (Pet. C.A. Br. 25 (*Young I*)) and then argued that the evidence in this case was insufficient to satisfy the preponderance standard. *Id.* at 24-30. Accordingly, under circuit precedent, the issue was not properly preserved when petitioner raised it on his second appeal. See *United States* v. *Escobar-Urrego*, 110 F.3d 1556, 1561 n.5 (11th Cir. 1997); *United States* v. *Fiallo-Jacome*, 874 F.2d 1479, 1481-1483 (11th Cir. 1989). Because of that fact, and because the opinions were unpublished per curiam opinions, the court of appeals did not thoroughly develop and discuss the facts of this case. Cf. *Wills* v. *Texas*, 511 U.S. 1097, 1098 (1994) (O'Connor, J. concurring in denial of certiorari) ("Following this practice [of declining to review claims raised for the first time on rehearing in the court below] makes good sense because we do not have the benefit of a decision analyzing the application of [a constitutional rule] to the facts of petitioner's case.").

There is also no reason to believe the result in this case would have been different had the district court made its quantity determinations using the "clear and convincing evidence" standard. In sentencing petitioner, the district court repeatedly emphasized that the evidence that petitioner participated in the conspiracy with Thompson and Brownlee was "overwhelming" (6/3/99 Sent. Tr. 25), and that there was "ample, ample evidence in the record at the trial" (5/2/01 Sent. Tr. 10) and at sentencing "from which to find that [petitioner] was involved in a conspiracy to distribute in excess of 50 kilograms." *Id.* at 9; accord *id.* at 11 ("on the record that's in front of me now, it seems to me that it's inescapable" that petitioner was responsible for more

than 50 kilograms). The evidence supporting that conclusion included (1) Thompson's exchange of packages with petitioner minutes before petitioner sold heroin to Johnson, Gov't C.A. Br. 31; 3/17/99 Trial Tr. 59-64; (2) petitioner's and Brownlee's intimidation of Johnson after they discovered that Thompson had mistakenly given her more cocaine than she had purchased, Gov't C.A. Br. 8; 3/19/99 Trial Tr. 340-346; 3/22/99 Trial Tr. 496-498; (3) petitioner's relationship with Patterson, who accompanied petitioner once to distribute heroin and to return $17,000 in proceeds to Brownlee, and whom petitioner offered to sell 75 kilograms of cocaine, 5/2/01 Sent. Tr. 72; (4) petitioner's presence at the July 1994 meeting where Thompson agreed to sell Patterson cocaine on a regular basis, *United States* v. *Thompson*, No. 97-662-CR-KMM, 6/18/99 Sent. Tr. 21-22;[10] see also 5/2/01 Sent. Tr. 11 (introducing transcript of *Thompson* sentencing into record in petitioner's case); and (5) Patterson's and Thompson's description of petitioner as an enforcer for the Brownlee organization, 5/2/01 Sent. Tr. 72-73, 80-81. There is thus no reason to conclude that the standard of proof necessary to establish petitioner's relevant conduct had an effect on petitioner's sentence.

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[10] Although petitioner emphasizes that neither he nor his counsel was present at Thompson's June 18, 1999, sentencing hearing to cross-examine Agent Barrett, see Pet. 5, 7-8, counsel was permitted to cross-examine Barrett extensively on remand, before Thompson's sentencing transcript was received into the record. See generally Sentencing Guidelines § 6A1.3(a) (permitting receipt of hearsay evidence so long as "the information has sufficient indicia of reliability to support its probable accuracy").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 02-1739

Supreme Court, U.S.
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In The

Supreme Court of the United States

WILLIE YOUNG, a.k.a. Punchie,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENTS OF REPLY

In its brief in opposition, the government states, "Both Thompson and the petitioner sold the drugs to Katrina Johnson, a government confidential informant...." Resp. 2. The record shows that many people sold drugs to Katrina Johnson, but the record also shows that Thompson and Young did not act in concert. The undercover-recorded conversations in the instant case conclusively showed that Thompson and Young acted independent of each other and without knowledge of each other's illegal activities. Thompson is recorded saying that he will not do business with Young, he advises Johnson to stay away from Young because Young is a thief, and Thompson expressly stated that he does not let Young know about his drug dealings. Trial Tr. 48, 49, 52. Indeed, based in part on these undercover-recorded conversations, Young was acquitted by his jury of conspiring with Thompson, Brownlee and the others charged. Throughout its brief, the government bends the evidence in a light most favorable to itself, even though the jury rejected the charge of conspiracy as to Young.

In like manner, the government incorrectly suggests in its brief that on May 24, 1996 Thompson had hand-delivered the small package of heroin to Young, which Young later delivered to Johnson on that date. Resp. 3. The evidence at trial is contrary to that assumption. A surveillance video on May 24, 1996 shows Young greeted Thompson, as Thompson drove into the restaurant parking lot. Trial Tr. 60. The video does not show that Thompson handed anything to Young. This video shows that a short time after Young

and Thompson exchanged greetings, Johnson drove into the parking lot. Young obtained the buy money from Johnson ($6,000), and then Young drove out of the parking lot with the buy money to return in seven minutes with the purported ounce of heroin sold to Johnson. Trial Tr. 62, 63, 64, and 168. While Young drove away from the restaurant, Thompson and Brownlee remained at that location. Trial Tr. 62 and 560. This transaction (involving one ounce of heroin), was not shown to have anything to do with Thompson or Brownlee, consistent the jury's acquittal of the conspiracy charge against Young.

The government asserts that Thompson identified Young in a recorded conversation as "one of Brownlee's henchmen." Resp. 4. In truth, the transcript of the relevant recorded conversation reveals that Thompson spoke of "this flunky" that was used to scare Johnson. Trial Tr. 497. Johnson did not testify at trial. Instead, DEA Agent Wright opined that "this flunky" may have been Young. Trial Tr. 498. On cross-examination, Agent Wright admitted that Thompson never identified "this flunky" as "Punchie" or Young. Trial Tr. 509. Again, the government stretches the evidence, as if the jury verdict supported its conspiracy theory, which it plainly rejected.

In the government's brief opposition, reference is made many times to the undercover recorded conversation of Thompson made on April 3, 1996, which was played for the jury. See Pet. App. 90-101 (Young I). Notwithstanding the government's interpretation of this conversation in its appellate briefs, the actual recorded statements of Thompson do

not indicate that Patterson (a.k.a. Baybro) bought ten kilograms of cocaine from Brownlee or any other co-defendant or that Thompson's regular two kilograms per month sales to Patterson for a fifteen month sale occurred between July 1994 and October 1995. In fact, the transcript identifies no dates when these transactions may have occurred. Moreover, Thompson identifies the source of supply of this cocaine as "the Cuban." Neither Brownlee or Young or any other person identified as a codefendant in this case was known as "the Cuban." Further, without a date indicated, only speculation could allow the jury to find that this activity occurred during the time periods relevant to the indictment. Not only did the jury find that this evidence did not support the conspiracy charged (as revealed by the acquittal), but the Eleventh Circuit in Young I held that there was no evidence at trial or at the sentencing to substantiate the PSR calculation of 50 kilograms attributed to Young as relevant conduct in the conspiracy for which Young was found not guilty. Pet A-5.

The government's assertion that Young had a prior relationship with Patterson does not factor in the calculus to determine whether sufficient evidence existed to substantiate the PSR statement regarding the 50 kilograms attributed to Young as relevant conduct. First, this hearsay "evidence" was introduced as part of the "second bite of the apple" after Young I, at the second sentencing hearing. Second, prior to that second sentencing hearing Patterson admitted to the defense counsel, in the presence of the prosecutor, that to his knowledge Young never actually possessed any illegal drugs. Sent. Tr. 86 (May 2, 2001). So, Patterson's

statements are simply unbelievable because he is a conniving, self-interested manipulating agent provocateur.

Indeed, the core issue in this case involves the credibility of the government's rogue informants. The government did not trust them enough to offer either Johnson or Patterson as a witness against Young at trial or at his two sentencing hearings. Yet, the hearsay statements of these agent provocateurs have formed the basis of the enhanced sentence imposed on Young. DEA Special Agent James testified that he would not want his liberty to rest on the credibility of the testimony of informants like Johnson. Trial Tr. 158. But this is precisely what happened to Young in this case, where a preponderance of the evidence, a very low burden of proof was used to increase his exposure from 51 months to 327 months incarceration. Both Johnson and Patterson had long histories of criminal activities involving drug distribution, forgery, thievery and the like. In fact, the government agents admitted that while they were documented informants they were also trafficking in illegal drugs without the government's knowledge (i.e. double dealing). Trial Tr. 142; Sent. Tr. 14, 15 (May 2, 2001). See Pet. App. 129-132 (Young I). Even while Young's sentencing hearing was pending, the prosecutor made a Brady disclosure to Young's counsel which showed that Patterson and Johnson engaged in an illegal conspiracy to sell Johnson's efforts to set up drug buys for inmates recruited by Patterson, so that these inmates could move for a reduced prison sentences. In essence, Patterson and Johnson set up a clandestine cottage industry whereby Johnson and Patterson would sell

their deception, perjury and trafficking skills to desperate inmates seeking reduced sentences for very large sums of money. See Pet. App. 137-139 (Young I). In this context, neither the statements of Johnson or Patterson against Young could reasonably amount to clear and convincing evidence to support an enhanced sentence of Young which was seven times than the guideline penalty range for Young's offense of conviction.

Finally, the fact that Young may have been present at a 4th of July picnic with Patterson, Brownlee and scores of other persons is not an evidence of any conspiratorial involvement, and the jury rationally concluded so by rendering its verdict of not guilty as to the charge of conspiracy against Young. The government's attempt to suggest otherwise is disingenuous. Resp. 20.

Initially, the government seems to argue that Young waived his Double Jeopardy issue in this case by failing to raise it previously. Resp. 9, 10 and 11. However, the government scrupulously avoids the term "waiver." Perhaps that term is avoided because it is well settled that a person cannot waive his Double Jeopardy claim without an intentional relinquishment or abandonment of this known right under the Fifth Amendment. See Ricketts v. Adamson, 483 U.S. 1 (1987); Johnson v. Zerbst, 304 U.S. 458 (1938). In the instant case, the evidence is undisputed that Young had not voluntarily and knowingly waived his Fifth Amendment right barring Double Jeopardy.

The government reframes the first issue raised in the petition by suggesting that Young seeks to overrule statutes, which empower courts of appeal to review judgments of lower courts. In fact, the narrow issue raised in Young's first issue, regarding the government's ability to have "a second bite of the apple" after an appellate finding of insufficiency of the evidence—seeks to preserve the integrity of the court of appeal's mandate. If the government is afforded a "second bite of the apple," then it is pointless for the defendant to even raise this issue of insufficiency on appeal and a court of appeals reversal for insufficiency would be meaningless. The government could merely keep returning to the trial court until they get it right, if it is afforded "a second bite of the apple." In truth, the government has no burden of proof for a sentencing enhancement, if it is given " a second bite of the apple." No matter what is offered by the government at the initial sentencing hearing, the government may consider it merely a practice run with an opportunity to return after remand to try again, and again, and again, until the sufficient evidence is presented. The government has it at its disposal a pool of desperate criminal informers anxious to sing a tune, which may lead to his or her freedom.

There is no rational or legal reason why the government is barred from following this procedure at a trial but not barred from doing so at a sentencing hearing. Unless, this Court closes this loophole in Due Process, the government will have no burden of proof at the defendant's sentencing and an appeal by a defendant based on insufficiency will be reduced to a fool's errand.

The government argues that there is agreement among the circuit on this issue. Resp. 12. Then the government proceeds to argue against itself by describing the variations on this theme among nearly all the courts of appeal. Indeed the issue is so unsettled that the ruling in Young I and II by the Eleventh Circuit conflicts with its own prior ruling in United States v. Dunlap, 279 F. 3d 965, 967 (11th Cir. 2002) (in Dunlap the Eleventh Circuit held that the government could present additional evidence at resentencing to prove sentencing enhancement because, unlike in Young, defense counsel failed to object to the lack of sufficient evidence).

With respect to Young's second issue in his petition, regarding a sentencing enhancement so enormous that it amounts to "a tail which wags the dog of the substantive offense," once again the government argues against itself. In United States v. Reed, No. 99-1096 (11th Cir. filed Dec. 29, 1999) the government sought this Court's resolution of this long unsettled issue. Apparently, the government believes a decision from the High Court on this issue was long overdue in 1999, but not so in 2003.

This Court in United States v. Watts, 519 U.S. 148, 157 (1997) acknowledged that there is a split in the Circuits as to whether relevant conduct must be proven by clear and convincing evidence in extreme cases. Indeed, this Court raised the issue seventeen years ago in McMillan v. Pennsylvania , 477 U.S. 79, 88 (1986). This issue is not going to go away. See Reed v. United States, 528 U.S. 1163 (2000). The time to resolve this important sentencing issue is long overdue.

The sentencing hearing in federal court has evolved to become the most significant proceeding in a criminal defendant's life. All the legal safeguards of evidence and procedure associated with a trial melt away at this stage or appear in reduced forms. The outrageous tragedy plaguing our system of justice involves tens of thousands of federal prisoners who have been convicted of relatively minor offenses, but who are sentence to 20, 30, 50 years in prison based often times on the hearsay statements of double-dealing, malevolent agent provocateurs like Patterson and Johnson who would say anything to save their own necks or to receive payments of large sums of money from the government. For thirty years the federal courts have sought to bring Due Process to sentencing, this case presents this Court the opportunity to speak to two open questions, which demand resolutions. When a person is convicted a relatively minor offense, like the sale of one ounce of heroin, and he is sentenced to 327 months in prison, like Willie Young, then the government should rely on more than merely the preponderance of the evidence standard, and the government should not be given successive opportunities to meet its burden of proof—that is, if the sentencing process is to be fair.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully request that his Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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WILLIE YOUNG
a.k.a Punchie,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR REHEARING

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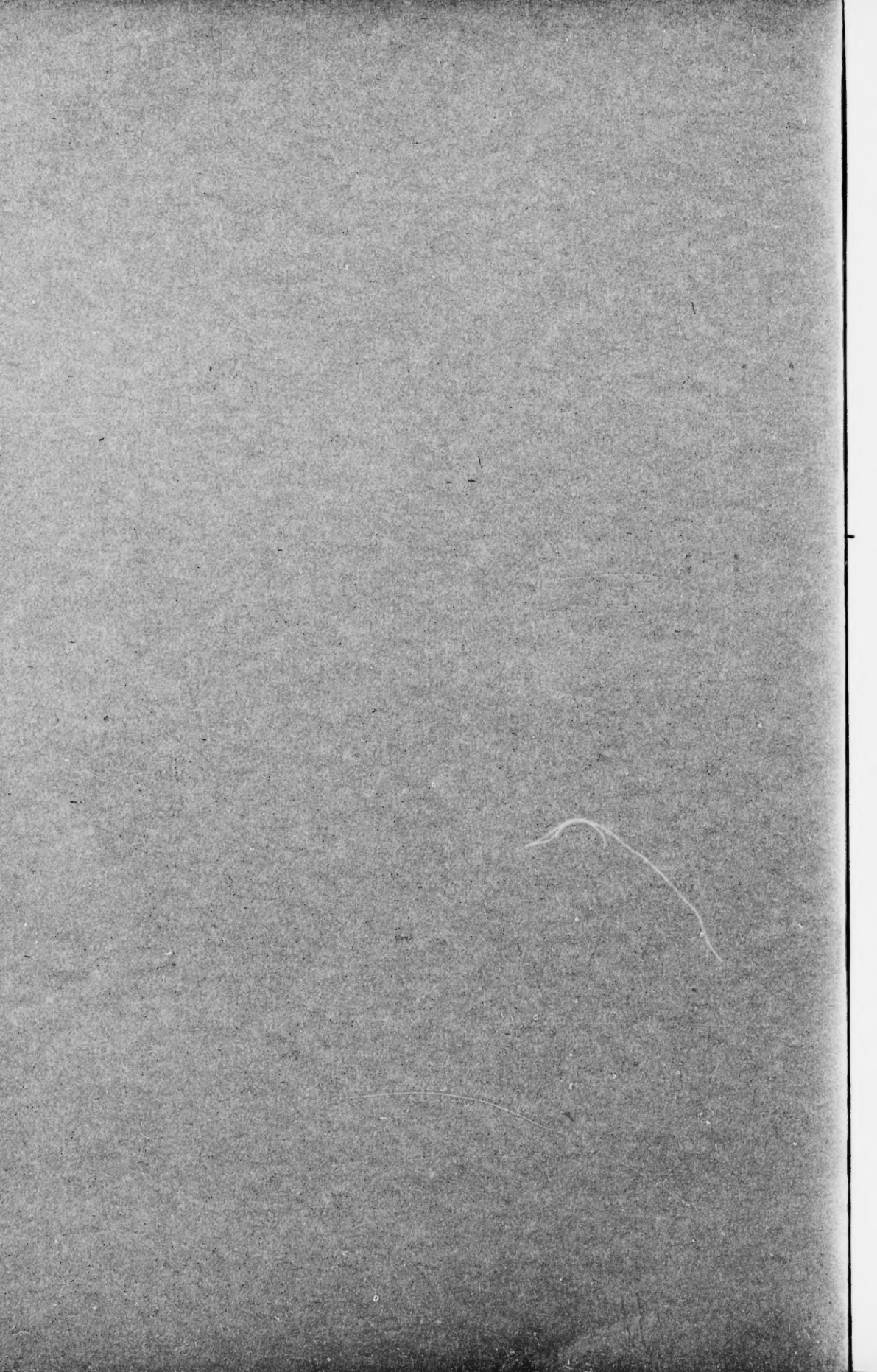

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-1739

WILLIE YOUNG a.k.a. Punchie,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

PETITION FOR REHEARING OF THE ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI

COMES NOW the Petitioner, WILLIE YOUNG, by and through his undersigned counsel pursuant to Rule 44 of the Supreme Court Rules and hereby petitions this Honorable Court for rehearing upon his petition for certiorari, and in support thereof would show as follows:

In his initial petition for writ of certiorari, the Petitioner urged this Honorable Court to take up for consideration the reoccurring issue of whether Due Process requires proof by clear and convincing evidence when a sentencing enhancement is so enormous that it amounts to "a tail which wags the dog" of the substantive offense. Young was sentenced to 327 months despite being convicted of

possession with intent to distribute less than one ounce of heroin.

In the government's brief in opposition, the argument was made that the Petitioner did not present the issue for review in his initial brief, and therefore he did not preserve it for review by this Court (Resp. 19). In fact, the issue was timely raised by the Petitioner (Pet. C.A. Br. 25; Young I). More importantly, the Eleventh Circuit explicitly ruled:

> ...Conduct for which a defendant has been acquitted may be considered "relevant conduct" for sentencing purposes if the defendant is shown by a preponderance of the evidence to have engaged therein. United States v. Watts, 519 U.S. 148, 155-157 (1997); United States v. Averi, 922 F. 2d 765, 766 (11th Cir. 1991)... (Pet. App. A-4).

Accordingly this issue has been properly preserved for review by this Honorable Court.

In a footnote, the government argues that, in fact, there is no divergence of opinions among the Circuits on this issue (Resp. 17, n.9) However, in United States v. Reed, No. 99-1096 (filed Dec. 29, 1999) the government made the exact opposite argument when it sought review of this chronic appellate issue. Indeed, on remand, since the district court imposed the same sentence after review based on clear and convincing standard, the petition for certiorari was dismissed upon the government's motion. United States v. Reed, 529 U.S. 1063 (2003). Young deserves no less consideration than Reed, particularly since Young's sentence could not be sustained under the heightened standard.

This Court found in 1997 that there is a divergence of opinion among the Circuits as to whether a clear and convincing standard of proof should be used to find a sentencing enhancement that dramatically increases the sentence. United States v. Watts, 519 U.S. 148, 156 (1997). That circumstance has not charged with passage of seven years.

Nearly every month "a tail wags the dog" case is reported. See e.g. United States v. Massey, No. 01-4459, Third Circuit (October 8, 2003). The unanswered questions raised by this issue cry out for resolution. Should the type of justice a person receives depend on his jurisdiction? When does the sentencing enhancement reach due process proportions? Are all sentencing enhancements subject to this constitutional restraint? Does this principle have retroactive effect?

The longer this Court avoids this open question, the more havoc it will ultimately visit on the criminal justice system. The time has come to address this issue, which was first raised by this Court nearly a generation ago in McMillan v. Pennsylvania, 477 U.S. 79, 88, (1986).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to: Solicitor General, Theodore B. Olson, Acting Assistant Attorney General, Christopher A. Wray, Jonathan L. Marcus, Esq. at the Department of Justice, Washington D.C., 20530-0001 this 31st day of October, 2003.

Respectfully submitted,

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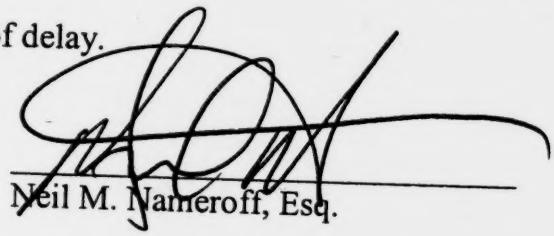
CERTIFICATE OF GOOD FAITH

The undersigned counsel duly admitted to appear before this Honorable Court hereby acknowledges that this petition for rehearing is presented in good faith and not for any purpose of delay.



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